Supreme Court, U.S.
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No. 04-____

IN THE

Supreme Court of the United States

CALIFORNIA FEDERAL BANK,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

After the government breached its contractual promises to allow savings and loan institutions to count supervisory goodwill as regulatory capital (*see United States v. Winstar Corp.*, 518 U.S. 839 (1996)), petitioner and many other thrifts raised capital from new investors. In a 2001 decision in this case, the Federal Circuit held that, except for transaction fees, the cost of new capital is zero and that the dividends and interest paid to new investors are not recoverable as damages for the government's breach. After remand on other damages issues and a second decision in this case, the Federal Circuit then held in another case that, as a matter of law, the cost of new capital is not zero and dividends and interest paid to new investors are recoverable as damages in *Winstar*-type cases. Should this case be remanded for reconsideration in light of the Federal Circuit's new holding on this legal question?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all of the parties to the proceeding in the court below.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Citibank (West), FSB is the parent corporation of CalFed. CalFed merged into Citibank (West), FSB on November 13, 2002. Citibank (West), FSB is a wholly owned subsidiary of Citibank (West) Holdings, Inc., which is a wholly owned subsidiary of Citibank (West) Bancorp, Inc. Citibank (West) Bancorp, Inc. is a wholly owned subsidiary of Citicorp Banking Corporation, which is a wholly owned subsidiary of Citicorp. Citicorp is a wholly owned subsidiary of Citigroup Holdings Company, which is a wholly owned subsidiary of Citigroup Inc., a publicly traded company. No other publicly traded company owns 10 percent or more of CalFed's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner California Federal Bank ("CalFed") respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

There are two opinions of the court of appeals. The first (App., *infra*, 1a-17a) is reported at 245 F.3d 1342 (2001). The underlying opinion of the trial court regarding remedies (App., *infra*, 18a-52a) is reported at 43 Fed. Cl. 445 (1999), and the opinion of the trial court regarding liability (App., *infra*, 57a-121a) is reported at 39 Fed. Cl. 753 (1997). The second opinion of the court of appeals (App., *infra*, 122a-143a) is reported at 395 F.3d 1263 (2005). The underlying opinion of the trial court (App, *infra*, 144a-173a) is reported at 54 Fed. Cl. 704 (2002).

JURISDICTION

The judgment of the court of appeals was entered on January 19, 2005. On April 7, 2005, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including May 19, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

CalFed agreed to acquire six failing thrifts, and to assume $638.04 million in net liabilities, in exchange for the government's express contractual promises concerning the calculation of regulatory capital. The government breached those promises upon the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), which eliminated most forms of contractual capital. *See United States v. Winstar Corp.*, 518 U.S. 839

(1996). FIRREA abrogated more than $300 million in goodwill capital held by CalFed, which raised additional capital by issuing stock and debentures, and sought as damages the dividends and interest it paid to its new investors—amounts that it would not have had to pay in the absence of the breach. The trial court limited its award to $23 million in transaction costs—essentially attorneys' and bankers' fees—incurred in these capital-raising transactions, and rejected CalFed's claim to recover the dividend and interest payments. The Federal Circuit affirmed.

1. This case arises from the thrift crisis of the 1980s, which previously has been chronicled by this Court in *Winstar*. 518 U.S. at 844-48. Between 1981 and 1983 alone, some 435 thrifts failed. *Id.* at 845. These failing thrifts left the Federal Savings and Loan Insurance Corporation ("FSLIC") itself insolvent; the costs of liquidating the thrifts would have swamped FSLIC's reserves by a factor of three. *Id.* at 847. "Realizing that FSLIC lacked the funds to liquidate all of the failing thrifts, the [Federal Home Loan Bank Board (FHLBB)] chose to avoid the insurance liability by encouraging healthy thrifts and outside investors to take over ailing institutions in a series of 'supervisory mergers.'" *Ibid.*

As this Court has explained, "[s]uch transactions, in which the acquiring parties assumed the obligations of thrifts with liabilities that far outstripped their assets, were not intrinsically attractive to healthy institutions; nor did FSLIC have sufficient cash to promote such acquisitions through direct subsidies alone, although cash contributions from FSLIC were often part of a transaction." *Winstar*, 518 U.S. at 848. Accordingly, to attract outside investors, FSLIC made regulatory commitments to potential acquirers—commitments that functioned as "cash substitute[s]" in the context of supervisory mergers. *Winstar*, 518 U.S. at 850.

In most supervisory mergers, the government contractually agreed to permit the acquiring institutions to count the

massive net liabilities assumed in the mergers as "supervisory goodwill," which could be considered an asset in meeting the regulatory capital requirement. *Id.* at 849-50; *id.* at 921 (Scalia, J., concurring in judgment) (goodwill promises were the "*sine qua non*" of the supervisory mergers). This treatment "would help the acquiring institutions meet their reserve capital requirements imposed by federal regulations" and was the "principal inducement" for these otherwise very costly supervisory mergers. *Id.* at 848. As this Court recognized, the use of supervisory goodwill increased "the institution's reserves, thereby allowing the thrift to leverage more loans (and, it hoped, make more profits)." *Id.* at 851; *see also id.* at 924 (Scalia, J., concurring in judgment) (observing that leverage capacity was the "essential bargain" of the contract). Adding to the importance of these promises, acquiring thrifts were permitted to amortize the supervisory goodwill over periods up to forty years, much longer than the amortization periods the government had previously authorized. *Id.* at 852-53.

2. In 1989, Congress passed the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), Pub. L. 101-73, 103 Stat. 183, which made significant changes in the structure of federal thrift regulation. *Winstar*, 518 U.S. at 856. FIRREA also vitiated the crucial feature of the supervisory merger agreements that the government had used to escape the savings and loan crisis. FIRREA imposed minimum capital requirements and eliminated the use of supervisory goodwill over a five-year period, far more quickly than the 40 years promised by many supervisory merger agreements. *Winstar*, 518 U.S. at 857.

In *Winstar*, this Court held that FIRREA's new regulatory capital requirements breached the contractual supervisory merger agreements by removing the central consideration for these agreements. 518 U.S. at 870. This Court recognized that these agreements were a great benefit to the

government and a great burden to the acquiring thrifts, with goodwill promises as the banks' principal compensation. *Id.* at 886-87, 869, 906, 908; *id.* at 918 (Breyer, J., concurring); *id.* at 919 (Scalia, J., concurring in judgment). The Court confirmed that the government was liable for the breach caused by FIRREA, and remanded the case for proceedings on the "appropriate measure or amount of damages." *Id.* at 910.

3. In 1981 and 1982, CalFed agreed to acquire, and thereby to assume the massive net liabilities of, six failing thrifts. The supervisory merger agreements with the government were materially indistinguishable from those in *Winstar*. These six failed thrifts had net liabilities in excess of $630 million; in exchange for this enormous cost, the government allowed CalFed to count over $600 million as supervisory goodwill and thereby regulatory capital. App., *infra*, 3a-4a. Also as in *Winstar*, the government allowed CalFed to amortize the goodwill capital over periods from 35 to 40 years. *Id.* The agreement relieved the government of its insurance liability for the failed thrifts, a liability that would have cost hundreds of millions of dollars in liquidating the banks. The government thus "convert[ed] some of its financial insurance obligations into responsibilities of private entrepreneurs." *Winstar*, 518 U.S. at 894.

In 1989, FIRREA eliminated approximately $300 million of CalFed's remaining supervisory goodwill, which constituted about half of CalFed's regulatory capital. As this Court recognized, the effects of FIRREA on an acquiring institution, such as CalFed, were "swift and severe." *Winstar*, 518 U.S. at 857. CalFed was forced to act immediately to keep from falling out of regulatory compliance. It sold billions of dollars in valuable assets that had been supported by the goodwill capital, and could not make additional profitable loans. Because CalFed no longer had the regulatory capital

necessary for a bank of its size, its asset base plummeted from $26 billion to $14 billion following the breach.

In an attempt to avoid this loss of earning assets, CalFed sought to raise additional capital in the external markets. Through a series of stock and debt offerings between 1992 and 1994, CalFed raised nearly $400 million to replace some of the capital that FIRREA destroyed and, thereby, to remain in compliance with the government's new regulatory capital requirements. App, *infra*, 49a.

4. CalFed sued the government for breach of contract. App., *infra*, 57a. After this Court held in *Winstar* that the government could be held liable for FIRREA-related breaches of contract, the Court of Federal Claims granted summary judgment to CalFed on liability. *Id.* at 120a-121a. This liability determination has twice been affirmed by the Federal Circuit. *Id.* at 3a-10a, 139a-142a. The Federal Circuit also affirmed the trial court's refusal to award restitution (*id.* at 14a-17a) or expectancy damages (*id.* at 126a-137a), and these remedial issues are not the subject of this petition.

The only damages the trial court awarded to CalFed were for the out-of-pocket costs of raising replacement capital through stock and debt offerings in the wake of the breach, and it is this category of damages that is the subject of this petition. The trial court concluded that the cost of replacement capital is zero and limited the award of damages to "flotation costs, including fees for underwriters and lawyers," incurred during the offerings. App., *infra.*, 49a-52a. Those out-of-pocket costs totaled $23 million. *Ibid.* The court refused to award CalFed the additional costs associated with these capital-market transactions—including the dividends and interest that it had to pay to investors.

The court of appeals affirmed the trial court's ruling on the measure of replacement cost damages. App, *infra*, 14a-17a. The court of appeals said that the ruling on the measure of replacement cost damages was a credibility judgment be-

tween competing witnesses. *Ibid.* According to the Federal Circuit, the trial court correctly credited the government's expert, who testified that the sole cost of replacing goodwill capital with cash capital—either of which would have supported the same assets—was the "flotation costs" paid to lawyers and bankers, and did not include the dividends and interest paid to investors. *Ibid.* This theory was premised on the notion that "the value of CalFed's newly raised capital equaled the cost of future dividends," such that the cost of new capital is zero. *Ibid.* This "factual finding," the court of appeals explained, was not "clear error." *Ibid.* As discussed below, this Court denied an interlocutory petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

As the courts below would have it, CalFed agreed to take on more than $600 million in net liabilities in order to avoid $23 million in attorneys' and bankers' fees associated with raising cash capital. The Federal Circuit, however, has since renounced the proposition that the cost of raising capital is limited to transaction costs. In *Home Savings of Am., F.S.B. v. United States*, No. 04-5020 (Fed. Cir. Mar. 7, 2005), the Federal Circuit categorically rejected this very argument and held, as a matter of law, that "capital is not costless" and that the cost of raising capital includes the "required rate of return"—*i.e.*, dividend or interest payments—"of the various types of financing" used to acquire the replacement capital. Slip op. at 21.

Thus, under current Federal Circuit precedent, CalFed would be entitled to recover the total costs that it sustained to raise sufficient cash capital to replace the goodwill capital the government took away. This is *precisely* the position that CalFed took when it petitioned for a writ of certiorari at an earlier stage of this litigation. *See* Pet. for Cert. in No. 01-592, at 23-28. At that time, the government opposed the petition on the principal ground that it was "interlocutory," and

urged the Court to defer consideration of this case because the Federal Circuit might clarify the legal issues in future *Winstar* cases. Opp. to Pet. for Cert. in No. 01-592, at [12-15]. It turns out that the government was prophetic: The Federal Circuit has made a 180-degree turn since its first decision in this case, and now holds that the very damages denied to CalFed are in fact recoverable as a matter of law. Accordingly, this Court should grant certiorari, vacate the judgment below, and remand for further consideration in light of *Home Savings*.

I. The Decisions In This Case And In *Home Savings* Are Irreconcilable

The Federal Circuit held in this case that the cost of new capital is zero and that the damages recoverable for post-FIRREA capital raises are limited to transaction costs and *exclude* dividend and interest payments on the capital raised. The Federal Circuit held in *Home Savings* that the cost of new capital is *not* zero and that dividend and interest payments *are* recoverable as damages by thrifts that raised additional capital after FIRREA. The two decisions are flatly inconsistent with one another.

1. The simple fact is that the Federal Circuit's view of the common law of damages has changed in the four years since the first decision in this case. At that time, this was the first case to present the question of "replacement cost" damages at the appellate level, and the Federal Circuit viewed it primarily as an issue of fact to be resolved by the factfinder. App, *infra*, 14a. As CalFed pointed out in its previous petition, this was wrong from the start, because the proper *measure* of damages is always a question of law for the court. Pet. for Cert. in No. 01-592, at 26. The Federal Circuit has gradually come around to agreeing with CalFed.

a. *CalFed* was never a case where factual nuances were of any consequence on the replacement cost issue. Due to

the government's contractual breach, CalFed lost nearly half of its regulatory capital, the "principal inducement" for assuming $600 million in net liabilities from six bankrupt thrifts. In an attempt to lessen the staggering losses caused by the breach, CalFed raised nearly $400 million in replacement capital through debt and stock offerings. This new capital was to serve the same purpose as the goodwill capital destroyed by the breach: It would support the *same* loans and other profitable assets that the goodwill capital would have. However, to conduct these same profit-making operations, CalFed was now required to pay dividends to its new shareholders and interest to its new creditors.

These dividends and interest payments were costs, pure and simple, that CalFed would not have incurred but for the breach. *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) ("the capital costs of the business . . . include service on the debt and dividends on the stock"). When private parties breach contracts, they are liable for the costs that the non-breaching party incurs in covering for the breach. *See Restatement (Second) of Contracts* § 347 cmt. c; *cf.* U.C.C. § 2-712. The Federal Circuit's refusal in *CalFed* to apply this common law rule of contract damages created an irreconcilable tension with numerous decisions of this Court, requiring that the government be bound by the same rules of contract liability and damages as a private party. *See Winstar*, 518 U.S. at 895 ("When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals"); *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 607-08 (2000) (the government is bound by the same contract damages rules as private parties).

b. The Federal Circuit resolved this tension in *Home Savings of Am., F.S.B. v. United States*, No. 04-5020 (Fed. Cir. Mar. 7, 2005). There, the plaintiff bank, like CalFed,

had raised private capital through debt and equity offerings to replace promised goodwill capital eliminated by the government's breach of contract. As in every *Winstar*-related case where replacement costs are sought, the government presented its categorical argument on the measure of damages, that raising capital "has no other cost than transaction costs." Slip op. at 21. But the Federal Circuit rejected this argument out of hand. *Ibid.* Instead, the Federal Circuit held "that capital is not costless; its cost is the required rate of return on various types of financing." *Ibid.* The question in *Home Savings* was, as it should have been in *CalFed*, to what extent the bank had been harmed "by having to seek [capital raises] in the first place" for activities that would have been supported by the goodwill capital alone. *Ibid.* In answering that question, the Federal Circuit affirmed the trial court's award to the plaintiff of the dividends and interest payments made to procure the replacement capital, less the "safe rate of return" (the yield on an intermediate-term Treasury Bond) that the bank realized by holding its regulatory capital in the form of cash rather than goodwill. *Id.* at 22.

c. Before the Federal Circuit's clear explanation in *Home Savings*, the Federal Circuit's law on the proper measure of replacement cost damages was deeply confused. In addition to *CalFed* and *Home Savings*, there are two other "replacement cost" cases in the Federal Circuit. In *LaSalle Talman Bank, F.S.B. v. United States*, 317 F.3d 1363 (Fed. Cir. 2003), the court allowed the thrift to recover dividend payments, without even mentioning *CalFed*. *Id.* at 1374-75. One year later, in an unpublished opinion in *Bank United v. United States*, 80 Fed. Appx. 663 (Fed. Cir. 2003), it denied those same damages, on the basis of *CalFed*. *Id.* at 672 (citing *CalFed* for the proposition that "the true costs of [a capital raise] are limited to flotation costs"). *Compare* App., *infra*, 14a ("the value of the cash proceeds of CalFed's newly raised capital equaled the cost of future dividends").

3. The uncertainty caused by these conflicting results was laid to rest by *Home Savings*, which clearly and unambiguously holds, as a matter of law, that dividend and interest payments are recoverable as damages. After *Home Savings*, the Federal Circuit has treated as settled law the proposition that some portion of interest and dividend expenses would be available if the bank actually had issued stock or debt to replace promised goodwill capital. *See Fifth Third Bank of Western Ohio v. United States*, No. 04-5009, slip op. at 28 (Fed. Cir. Mar. 31, 2005) (discussing the principle of *Home Savings*, while denying replacement cost damages where the bank had not gone to the external market).

Moreover, *Home Savings* put to rest the misguided notion that the measure of damages is a *factual* issue that might be resolved differently in different cases. As the court of appeals made clear in its discussion of the standard of review, the Federal Circuit *rejected* the proposition that the recoverability of dividend payments is a question of *fact* that could be reviewed only for *clear error*. *Home Savings*, slip op. at 8 (rejecting the clear error standard of review for "decisions about methodology for calculating rates and amounts"). This holding cannot be squared with the decision in *CalFed*. App., *infra*, 14a ("We see no clear error in the court's factual finding that the flotation costs provided an appropriate measure of CalFed's damages incurred in replacing the supervisory goodwill with tangible capital"). *Home Savings* thus points up—and corrects—a fundamental error made by the Federal Circuit in this case—the notion that an economic principle is a factual rather than legal issue. *Cf. Basic, Inc. v. Levinson*, 485 U.S. 224, 241-42, 246-47 (1988) (adopting economic theory that competitive market prices reflect all available information to set legal presumption for SEC Rule 10b-5 cases); *see also LaSalle Talman Bank, F.S.B. v. United States*, 45 Fed. Cl. 64, 105 (1999) (rejecting the flotation cost theory as a matter of law because "it has no value as a tool for calculating damages for breach of contract").

In so doing, the Federal Circuit has now brought itself into line with the uniform rule in every other court of appeals, and has thus eliminated the circuit conflict on which CalFed's previous petition was premised. Had it not been corrected by *Home Savings*, the Federal Circuit's holding in *CalFed*—that whether replacement costs are limited to attorneys' and bankers' fees is a factual question—would create a fundamental conflict among the circuit courts of appeals. Nearly every other circuit recognizes that, while the *amount* of damages may be a question of fact, the *measure* of damages is always a question of law to be reviewed *de novo*. *See, e.g.*, *Boston Old Colony Ins. Co. v. Tiner Assoc., Inc.*, 288 F.3d 222, 230 (5th Cir. 2002) ("On appeal, this Court reviews the ruling regarding the proper measure of damages *de novo*"); *Scully v. U.S. Wats, Inc.*, 238 F.3d 497, 507 (3d Cir. 2001) ("Our standard of review is plenary because whether the District Court applied the appropriate measure of contract damages is a question of law"); *Delchi Carrier, SpA v. Rotorex Corp.*, 71 F.3d 1024, 1029 (2d Cir. 1995) ("we review questions of law, including 'the measure of damages upon which the factual computation is based,' de novo"); *Galindo v. Stoody Co.*, 793 F.2d 1502, 1516 (9th Cir. 1986). These decisions directly conflict with the Federal Circuit's decision in this case.

This conflict between the Federal Circuit's decision in this case and the uniform rule in other circuits would warrant plenary review by the Court were it not for the intervening decision in *Home Savings*, which corrected the Federal Circuit's earlier error in this case. But the decision in *Home Savings* was issued long after the decision in this case, and thus CalFed did not have the benefit of the Federal Circuit's newly announced rule of law. CalFed seeks this Court's intervention for the limited purpose of returning this case to the Federal Circuit for consideration in light of *Home Savings*.

II. The Issues Presented By This Case Warrant This Court's Intervention

Contrary to its decision in *CalFed*, the law in the Federal Circuit is now clear that replacement cost damages are not limited to transaction costs such as legal and underwriting fees. The Federal Circuit's decision in *Home Savings* announces a rule of law that is inconsistent with the decision in this case, and this Court should issue a GVR order to allow the Federal Circuit to apply that rule to this case. The availability of a summary disposition short of plenary review—a mechanism that conserves this Court's finite resources—wholly justifies this Court's intervention.

1. The Federal Circuit's recent decisions make clear that its denial of all but transaction costs to CalFed was wrong, and that the government's arguments in the past against review on this issue have no merit. And the Federal Circuit's directly contrary recent decisions on this important issue can be resolved by this Court's summary disposition procedures. When a lower appellate court's recent decision has produced irreconcilably conflicting rulings on the same issue, this Court has granted the petition for certiorari, vacated the conflicting ruling, and remanded for further consideration in light of the appellate court's later ruling. *See Alabama v. Ritter*, 454 U.S. 885 (1981) (granting certiorari, vacating, and remanding case to Alabama Supreme Court for consideration in light of an intervening decision of that court); *United States ex rel. Robinson v. Johnston*, 316 U.S. 649 (1942).

The Federal Circuit's intervening *Home Savings* decision meets all of the criteria for a GVR order. *See Lawrence v. Chater*, 516 U.S. 163, 167 (1996). Where there has been an intervening development since the lower appellate court's decision that "reveals a reasonable probability that the decision below rests upon a premise that the lower court would reject given the opportunity for further consideration," this Court has found GVR orders appropriate. *Ibid.* ; *see also id.*

at 191-92 (Scalia, J., dissenting) (confining GVR orders to cases where the event, such as the *Home Savings* decision here, occurred after the decision under review). No event better reveals a lower appellate court's inclination to change its ruling than its own, intervening decision to the contrary. Importantly, the Court has recognized that this mode of summary disposition "alleviates the 'potential for unequal treatment' that is inherent in our inability to grant plenary review of all pending cases raising similar issues." *Id.* at 167. Requesting that the court of appeals resolve this case in light of its own, contrary intervening decision would address what would otherwise be unequal treatment of identical legal issues.

Moreover, this Court has granted review to resolve apparent conflicts within a circuit when it has deemed the question important. *Commissioner v. Estate of Bosch*, 387 U.S. 456, 457 (1967); *John Hancock Ins. Co. v. Bartels*, 308 U.S. 180, 181 (1939). Of particular importance here is that the Federal Circuit has exclusive jurisdiction over *Winstar* cases. This Court has found resolving intra-circuit conflicts particularly appropriate where, as here, the appellate court has almost total dominion over a subject. *Cf. Maggio v. Zeitz*, 333 U.S. 56, 59-60 (1948) (granting certiorari to resolve an intra-circuit conflict when one circuit was the one most frequently confronted with a difficult bankruptcy issue).

2. Indeed, this Court has undertaken a special responsibility to review and to intervene in the Federal Circuit's administration of matters within its exclusive jurisdiction. Specifically, this Court has frequently granted review of cases within the Federal Circuit's exclusive jurisdiction over breach of contract claims against the government, recognizing that a conflict among the circuits may never arise, where the Federal Circuit has departed from the accepted course. *See, e.g., Hercules, Inc. v. United States*, 516 U.S. 417 (1996) (resolving whether government contractor could re-

cover tort judgments incurred in the course of performing the contract from the government); *Keene Corp. v. United States*, 508 U.S. 200, 205-06 (1993) (granting certiorari to interpret 28 U.S.C. § 1500, which exclusively concerns the jurisdiction of the Court of Federal Claims). Under such circumstances, this Court again has focused on the importance of the issue at stake in the case in determining whether review is warranted. *See* Stern & Gressman, *Supreme Court Practice* § 4.21 at 264-65 (8th ed. 2002).

In *Winstar* itself, there was no conflict among the courts of appeals. Instead, the Court granted certiorari "to consider the extent to which special rules, not generally applicable to private contracts, govern enforcement of the governmental contracts at issue here." 518 U.S. at 860. The *Winstar* Court held that the government could not rely on such special *liability* rules, and the *Mobil Oil* Court extended that principle to contract *remedies*. But the Federal Circuit's acceptance of special rules to protect the government from bearing the cost of its FIRREA-related breaches has emptied this Court's mandate of any meaning. A GVR order presents an attractive and efficient mechanism to discharge this special oversight responsibility over the Federal Circuit.

CONCLUSION

The Court should grant the petition for a writ of certiorari, vacate the Federal Circuit's judgment, and remand for further consideration in light of *Home Savings of Am., F.S.B. v. United States*, No. 04-5020 (Fed. Cir. Mar. 7, 2005).

Respectfully submitted.

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